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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. _____

J. TRUETT PAYNE COMPANY, INC.,
a corporation,
Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. When there is proof that Chrysler discriminated in sales price against Payne, totaling $81,248 over a 3½ year period, sometimes as much as $300 per car, during each of thirteen separate rebate programs, does the Fifth Circuit's holding that, in order to show a violation of Section 2 (a) of the Robinson-Patman Act, Payne must prove that the result of the price discrimination "is likely to be a *severe* adverse effect on competition" with the favored competitior "likely" to draw sales and profits from Payne impose an overly strict standard of proof on Payne, the disfavored competitor, thereby overruling *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948) and *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969) which permit an inference of the adverse effect on competition when there has been substantial price discrimination?

2. Despite a jury verdict showing that Chrysler Motors violated Section 2 (a) of the Robinson-Patman Act and despite proof of substantial price discrimination in a keen competitive market which would have a reasonable possibility of causing injury to competition, and despite direct proof of a reduction of market share to the disfavored buyer, J. Truett Payne Company, did the Fifth Circuit's decision overruling the jury verdict and directing entry of judgment for Chrysler Motors ignore the principle in *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969), which requires the jury to determine whether or not there was a violation of Section 2 (a) of the Robinson-Patman Act?

3. Whether evidence showing sustained violations of Section 2 (a) of the Robinson-Patman Act, together with evidence of keen competition in the market, relatively small profit margins, substantial price discriminations sufficient to influence retail sales prices and cause a decline in the sales and profits of J. Truett Payne Company so that it eventually went out of business, is sufficient to permit a jury to find under the more lenient standard of proof that Chrysler's violation of the Robinson-Patman Act caused injury or damage to the business or

property of J. Truett Payne Company under Section 4 of the Clayton Act?

4. Whether the evidence showing that Chrysler violated the Act and J. Truett Payne Company suffered substantial price discrimination in the amount of $81,248, coupled with evidence that the increased price was not passed through to Payne's retail customers and with evidence of declining sales and profits, eventually causing Payne to go out of business when its going concern value was between $50,000 and $170,000, is sufficient to permit the jury to find antitrust injury and damages.

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PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT*

Petitioner respectfully prays that a Writ of *Certiorari* issue to review the order of the United States Court of Appeals, Fifth Circuit, 670 F.2d 575 (5th Cir. 1982) entered on March 19, 1982, which reversed the judgment of the District Court for the Northern District of Alabama awarding to J. Truett Payne Company, Inc. the sum of Three Hundred Seventy-Three Thousand Seven Hundred Forty-Two and 44/100 Dollars ($373,742.44) for a violation of the Robinson-Patman Act in the case of *Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation,* No 77-2331.

*Former Fifth Circuit case, § 9(1) of Public Law 96-452, October 14, 1980; decided by Circuit Judges in the Eleventh Circuit as a former Fifth Circuit case.

In addition, Petitioner respectfully prays that a Writ of *Certiorari* issue to review that final order of the United States Court of Appeals, Fifth Circuit, on April 26, 1982, 677 F.2d 117 (5th Cir. 1982) (*En Banc*) which overruled and denied Petitioner's Petition for Rehearing *En Banc*.

QUESTIONS PRESENTED

1. When there is proof that Chrysler discriminated in sales price against Payne, totaling $81,248 over a 3½ year period, sometimes as much as $300 per car, during each of thirteen separate rebate programs, does the Fifth Circuit's holding that, in order to show a violation of Section 2(a) of the Robinson-Patman Act, Payne must prove that the result of the price discrimination "is likely to be a *severe* adverse effect on competition" with the favored competitior "likely" to draw sales and profits from Payne impose an overly strict standard of proof on Payne, the disfavored competitor, thereby overruling *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948) and *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969) which permit an inference of the adverse effect on competition when there has been substantial price discrimination?

2. Despite a jury verdict showing that Chrysler Motors violated Section 2(a) of the Robinson-Patman Act and despite proof of substantial price discrimination in a keen competitive market which would have a reasonable possibility of causing injury to competition, and despite direct proof of a reduction of market share to the disfavored buyer, J. Truett Payne Company, did the Fifth Circuit's decision overruling the jury verdict and directing entry of judgment for Chrysler Motors ignore the principle in *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969), which requires the jury to determine whether or not there was a violation of Section 2(a) of the Robinson-Patman Act?

3. Whether evidence showing sustained violations of Section 2(a) of the Robinson-Patman Act, together with evidence of keen competition in the market, relatively small profit margins,

substantial price discriminations sufficient to influence retail sales prices and cause a decline in the sales and profits of J. Truett Payne Company so that it eventually went out of business, is sufficient to permit a jury to find under the more lenient standard of proof that Chrysler's violation of the Robinson-Patman Act caused injury or damage to the business or property of J. Truett Payne Company under Section 4 of the Clayton Act?

4. Whether the evidence showing that Chrysler violated the Act and J. Truett Payne Company suffered substantial price discrimination in the amount of $81,248, coupled with evidence that the increased price was not passed through to Payne's retail customers and with evidence of declining sales and profits, eventually causing Payne to go out of business when its going concern value was between $50,000 and $170,000, is sufficient to permit the jury to find antitrust injury and damages.

OPINIONS BELOW

The Fifth Circuit's original opinion in this case is reported at 607 F.2d 1133 (5th Cir. 1979) (Appendix p. 25). After granting certiorari, the Supreme Court reversed and remanded the Fifth Circuit in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (Appendix p. 11).

On March 19, 1982, the second opinion of the Fifth Circuit is reported in *Chrysler Credit Corporation v. J. Truett Payne Company, Inc. v. Chrysler Motors Corporation*, 670 F.2d 575 (5th Cir. 1982), contained in the Appendix, p. 1. On April 26, 1982 the Fifth Circuit overruled and denied the Petition for Rehearing En Banc, reported at 677 F.2d 117 (5th Cir. 1982), and set forth at Appendix, p. 10. The Appendix is separately presented from this Petition.

JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, reversing the trial court's judgment in this case and directing entry of judgment for Chrysler was entered on March

19, 1982. Petitioner's Petition for Rehearing *En Banc* was denied on April 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). This Petition was filed within ninety days of the Fifth Circuit's order denying a rehearing.

THE STATUTES INVOLVED

The pertinent provisions of the Robinson-Patman Act, 15 U.S.C. § 13, a copy of which in full is set forth at Appendix, p. 56, is set forth below:

> It shall be unlawful for any person engaged in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure or destroy or prevent competition with any person who either grants knowingly or receives the benefit of such discrimination or the customers of either of them . . . .

In addition, 15 U.S.C. § 15 states as follows:

> Any person who shall be in injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the main controversy and shall recover three-fold the damages by him sustained, and the cost of suit including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. *Chronology.*

This price discrimination case was tried in the United States District Court for the Northern District of Alabama, Southern Division. The jury's verdict of $111,247.78 against Chrysler Motors Corporation (hereinafter called "Chrysler") was trebled and an attorney's fee added, resulting in a judgment against Chrysler in the amount of $373,742.44. Chrysler's

Motion for Judgment Notwithstanding the Verdict or for a New Trial was denied. Chrysler appealed to the Fifth Circuit on June 15, 1977.

The Fifth Circuit originally held that J. Truett Payne Company, Inc. (hereinafter "Payne") had presented insufficient proof of cognizable antitrust injury and insufficient proof of the amount of damages because damage could only be shown by lost sales and profits, and directed entry of judgment for Chrysler pursuant to its Motion for Judgment Notwithstanding the Verdict. 607 F.2d at 1137. However, the Fifth Circuit did not reach the issue of the jury's finding that Chrysler violated the Robinson-Patman Act.

After granting Payne's Petition for Certiorari, the Supreme Court reversed and remanded, holding that since the Fifth Circuit did not reach the issue of whether the Robinson-Patman Act had been violated, then the Court could not tell whether to apply the more lenient standard of proof available when the Act had been violated that permits a wronged party to prove, with a lesser burden, the causation of damage and amount of that damage. 451 U.S. 557, 568.

On March 19, 1982, the Fifth Circuit held that there was insufficient evidence for the jury to have concluded the Act was violated (670 F.2d 575, 581) and also held that Payne had failed to prove cognizable antitrust injury or the amount of that injury. On April 26, 1982, the Fifth Circuit denied a rehearing. 677 F.2d 117.

B. *The Facts.*

The evidence in the trial showed as follows: Payne had been a Chrysler-Plymouth retail automobile dealer in Birmingham, Alabama, since approximately 1944 (TR. 40). Prior to and during a 3½ year period from approximately December 1970 until Payne was forced out of business in May 1974, Payne competed with three other Chrysler-Plymouth dealers[1] in a

[1]Those competing Chrysler dealers were Roebuck Chrysler-Plymouth (sometimes known as Car Center), Central Motors, and Bessemer Chrysler-Plymouth (sometimes known as Hall Motor Company, and later changed in 1972 to Vestavia Chrysler-Plymouth).

market of exceedingly tough competition in Birmingham-Jefferson County, Alabama. Customers shopping for new cars compared Payne's prices with each of the other three Chrysler-Plymouth dealers competing with Payne (TR. 45-46; 124).

From November 1970 through May 1974, Chrysler created approximately sixteen rebate or incentive programs relating to the retail sales (non-fleet) of new cars, each program lasting several months, under which it would make rebate payments to those dealers on the new cars sold by the four competing Chrysler-Plymouth dealers in the Birmingham, Alabama market area. Chrysler unilaterally assigne deach dealer a separate and different quota for wholesale purchases and/or retail sales which each dealer had to satisfy in order to obtain the rebate payments. The rebate payments Chrysler made to a dealer on a particular car during a rebate program reduced the price of the new car purchased from Chrysler by the dealer and had an effect on and influenced the price charged the customer by a dealer (TR. 56; 62; 95; 124-125; 256; 617-618).

In almost every rebate program, Chrysler assigned Payne a higher quota than its competing dealers, and Payne had to meet that higher quota in order to receive a rebate payment. Payne had to either purchase more new cars from Chrysler or sell more new cars in order to obtain a rebate payment from Chrysler reducing the costs of those cars. Compared to the other dealers, Payne actually paid more for almost every car involved in the rebate programs because it could not meet the high quotas. The total price discrimination against Payne during a three and one-half year period of the rebate programs was $81,248.94. As a result of the higher quotas assigned Payne and the rebates paid by Chrysler to the other qualifying dealers, Payne lost sales because it was at a trade disadvantage with those competing dealers (TR. 65-67; 68-69), Payne could not meet the low price that the other Chrysler dealers were offering in the Birmingham market (TR. 91, 124) These rebate programs in issue were run almost continuously so that almost every car that was sold at retail by Payne and its competitors was covered by a rebate program.

Because of the price disadvantage at which the rebate programs put Payne, Payne ended up forcing business in order to make a sale and was losing some customers because of higher price (R. 65-69; 91-92; 94-95; 126-127). The price of a new car is ordinarily composed of two elements: (1) the amount allowed by a dealer for a used car traded in by the customer. and (2) the amount charged by the dealer on the new car. Many times in order to make a sale of a new car, Payne had to over-allow on the used car traded in by the customer (TR. 55; 711-712). Payne had to sell at a smaller profit than it could afford to sell and still compete effectively, and generally it did not meet the lower prices of the other dealers (TR. 91; 124). Payne was losing customers and sales because of the rebate programs (TR. 65-67; 68-69; 91-92; 94-95; 1267-127). For the last five years of its operations, Payne lost money, primarily because of its losses in the used car operations (TR. 538-539).

There was clear evidence that the price discrimination caused a drop in Payne's share of the market. The year 1968 is the base period with which to compare Payne's sales and profits during the period of discrimination from 1970-1974 in issue since the only non-discriminatory year for which there is evidence of Payne's share of the market is 1968. In 1968, Payne made net profits of $36,140.62 and sold 658 cars at retail (Pl. Ex. 61). According to Chrysler's own witness, Payne sold 40% of the total new car market in 1968 (TR. 364), or about a 31.5%[2] share of the retail (non-fleet) market for 1968. Clearly then, the price discrimination to the favored dealers caused a

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[2]Payne's total sales in 1968 were 991 units—658 retail and 333 fleet (Pl. Ex. 61). The total Birmingham market in 1968 would thus have been 2,478 cars, which is derived from Chrysler's testimony that Payne sold 40% of the total new car market. Given the fact that the other dealers always had fewer fleet sales than Payne, their total during 1971, 1972 and 1973 averaging 13.4% of the market's fleet sales, the retail (excluding fleet) market in 1968 would have been approximately 2,089 cars, which is calculated by using their same average percentage of total fleet sales (13.4%) (See Def. Ex. 31). Thus, Payne would have had a 31.5% share of the retail market (excluding fleet) in a year where there were no discriminatory rebates shown.

reduction in Payne's share of the retail new car market during 1970 through 1973. In 1970, Payne's share of the retail (non-fleet) sales of new cars had dropped to 24% of the market; in 1971, it was 26.9%; and in 1972, it was 23%. In 1973, after Chrysler reduced the fair share for Payne to 25.99%, Payne's share of the retail non-fleet market increased to 25% (*See*, Def. Ex. 31). During the years 1971 and 1972, the Birmingham market was expanding in the number of retail non-fleet sales, while Payne's share was declining.

The rebates per car paid by Chrysler to each dealer under those rebate programs reduced the dealer's cost on that car (TR. 138; 527; 618). Dr. Ignatin, an economist, is thoroughly familiar with the car market in Birmingham and did several studies about the Birmingham market (TR. 201; 695). Chrysler's rebate programs reduced competition in the Birmingham market between Chrysler dealers and had an adverse effect on competition (TR. 222). As a result of the rebate payment to the competing dealer, Payne could not compete as well with the other dealers because it got less of a price reduction on the cars (TR. 203; 256-257). The rebates actually injured Payne's business by (1) causing it to lose profits it would have otherwise made had Chrysler's prices been equal, and (2) diminishing its ability to compete for sales (TR. 256-258).

The effects of the price discrimination are most evident when compared to the dealers' tight profit margins. Profit margins on the used cars traded in by the customer were very small, especially when compared to the amount of rebates per car. The net profits per used car in 1971 ranged from $13 for Payne to $118 for Vestavia; in 1972, from $27 for Payne to $90 for Roebuck; in 1973, from $12 for Payne to $142 for Central (Def. Ex. 31; 40; and 41).

It is well known in the automobile industry that all dealers discount off list price in setting the retail price of the car for a customer. Because of these rebate payments, Payne could not discount its cars from list price as much as it could have if it

had received the same rebate per car as the other dealers competing with Payne at that time. Other competing dealers therefore did not have to discount their price on new cars as much as they otherwise would have done had Payne received an equal rebate per car from Chrysler. The effect of the discrimination against Payne under the Chrysler rebate programs was to maintain a retail price to a consumer at artificially high levels. Thus, by reducing the actual competition in the market, the rebates had an adverse effect on competition and on the consuming public (TR. 203-204; 205; 222; 255).

The price discrimination from the rebate programs was one of the causes of Payne's going out of business in May, 1974 (TR. 68-69; 100; 705-706). Without those price discriminations, Payne's expenses would have been less, it could have offered more customer-attracting services or advertising (which the other dealers could do with more rebates and therefore increase their sales), and Payne could definitely have stayed in business. Evidence of value of the Payne business in May 1974, when it was forced out of business, ranged between $50,000 and $170,000. (TR. 75-76; 115-116; 210-218).

Dr. Ignatin used a capitalized stream of profits method in giving his opinion that the business was worth $170,000. Chrysler's expert economist, Dr. Geisel, agreed that Doctor Ignatin's second method of valuing the busines by capitalizing the profit stream is a correct method of valuing a business (TR. 601, 603). Dr. Ignatin testified there was price discrimination against Payne from all but three rebate programs. He calculated for each program how much more money the favored dealers received on a per car basis than did Payne under that same program, as well as the amount of discrimination resulting to Payne in each program (See, Pl. Ex. 37-53; TR. 140-184; 222-223; App. 36-53). In thirteen out of sixteen rebate programs, Payne was disfavored and damaged[3] since it did not receive as great a rebate per car as did the more favored dealers in that program. During the 3½ year period in issue, the total

[3]See results of those rebate programs in the Appendix, pp. 36-53.

amount of price discrimination against Payne on the automobiles it sold during this period was $81,248.94 (TR. 191).

Eight of the sixteen rebate programs established quotas based on a dealer's "fair share" as defined by Chrysler. The "fair share" ultimately became the basis of the "quota" to be attained before any rebate is paid to the dealer under the majority of the rebate programs. According to Chrysler, "fair share" represents the percentage of the total Birmingham market of auto sales which a dealer "should" attain. It was unilaterally set by Chrysler and remained in effect until changed by Chrysler (TR. 296-332). The "fair share" percentages assigned to each dealer during 1970 through 1972 were as follows: Payne – 40.19%; Bessemer – 12.99%; Central Motors – 25.77%; Roebuck – 21.05% (Pl. Ex. 36).

Bessemer Chrysler-Plymouth relocated from Bessemer to Vestavia in May 1971. Chrysler knew that by moving Bessemer Chrysler-Plymouth to Vestavia and into Payne's trading zone, the re-location would take away some of Payne's customers and business (TR. 358-359), but Payne had to suffer with a forty percent "fair share" quota until Chrysler got around to reallocating this quota in 1973 (TR. 434). Payne's new "fair share" was reduced to 25.99% effective in 1973 (TR. 319-321). The new "fair shares" of each dealer as of January 1973 were: Payne – 25.99%; Roebuck – 25.16%; Central – 25.43%; Vestavia – 23.42% (Pl. Ex. 36).

The purpose of the rebate programs was to gain a larger share of the car market for Chrysler compared to its competitors by allowing it to sell more cars to its dealers (TR. 444, 448, 479). These rebate programs contained, for the most part, a wholesale objective program or a retail objective program or, allocated to each dealer on the basis of its assigned fair share of the Birmingham market (TR. 449-450; 465; 488-491). The jury obviously found the fair share unfair and unreasonable to Payne.

C. *Basis for Federal Jurisdiction in Trial Court.*

This case was brought in the trial court under the Robinson-Patman Act, 15 U.S.C. § 13, and under Section 4 of the Clayton Act, 15 U.S.C. § 15, which permit a suit in the United States District Court by any person who shall be injured in his business or property as a result of anything forbidden in the antitrust laws, and specifically the Robinson-Patman Act.

REASONS FOR GRANTING THE WRIT

I. Summary.

The Fifth Circuit's decision improperly substitutes its judgment on the facts for that of the jury, and severely undermines private plaintiffs' rights to enforce the Robinson-Patman Act. It imposes an unreasonably strict standard of proof for showing violation of the Robinson-Patman Act and for showing causation of antitrust damage and the amount of that damage. The Fifth Circuit's opinion requires that a disfavored competitor must prove that the price discrimination is "likely to be a severe adverse effect on competition" and that the "likely effect" of the price discrimination is to permit the favored competitor to draw sales and profits away from the disfavored competitor. 670 F.2d at 580. It ignores the evidence which clearly would permit a jury to find violation of the Act and conflicts with the following decisions of the United States Supreme Court and other Circuit Courts of appeal which have held that a jury is entitled to infer a violation of the Act and injury to the plaintiff when the plaintiff has been disfavored by substantial price discriminations in a market of keen competition: *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969); *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948); *Hanson v. Pittsburgh Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136; *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163 (7th Cir. 1972); *E. Edelmann & Co. v. FTC*, 239 F.2d 152; (7th Cir. 1956); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir.) *cert. denied*, 382 U.S. 959 (1966).

The decision below should be reviewed because it erroneously substitutes the court's own judgment of the facts (*i.e.*, that there was no price discrimination which could possibly have adversely affected competition or injured Payne) in the face of *clear* evidence from which the jury could determine directly, or by inference, that there was substantial price discrimination in the context of keen competition causing Payne to lose a large part of the market share it had before the discrimination and causing injury to the consumers by maintaining an artificially high sale price.

Since there was a violation of the Act, the more lenient standard of proving antitrust injury and the amount of damages is applicable and should have been applied by the Fifth Circuit as set forth in this Court's earlier opinion in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-568 (1981). The market in which Payne competed was one of exceedingly tough competition where customers compared the prices of the various competing automobile dealers. The amount of the price discrimination of the various automobiles on which Chrysler reduced the price to Payne's competitors was substantial, sometimes as much as $300 per car.[4] Since the price discriminations were substantial compared to the dealer's profit on a typical sale, Payne's business showed losses during the relevant time of price discriminations and a profit in 1968 when there was no price discrimination, and a loss of market share after the price discrimination, then the Fifth Circuit should have permitted the jury's finding of a violation of the Act and antitrust damages to stand. *FTC v. Morton Salt Co., supra* at 50; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969); *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969); *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972); *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973) *cert. denied* 414 U.S.

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[4]See for example Plaintiff's Exhibit 52, attached to the Appendix at p. 51.

1136; *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir.) *cert. denied*, 382 U.S. 959 (1966).

The Fifth Circuit refused to apply the principles of the above cited cases. In effect, the Fifth Circuit has continued to look for proof of lost sales or profits resulting from the price discrimination in order to prove a violation of the Act. 670 F.2d at 580. This reasoning overlooks the crucial fact that, during the 3½ years of price discrimination, Payne was reducing its sales price, over-allowing on its used car trade-ins in order to maintain its sales volume, and not passing on its increased costs to its customers. Thus there would not have been a substantial loss of market share during the price discrimination. But there would have been a substantial loss (which in fact occurred in Payne's business) and a lessening of Payne's capital position and ability to compete against its competitors. Also, the court ignored the evidence showing a large decline in Payne's market share since 1968, a year where there was no price discrimination. These latter facts were proved, as well as the fact that the price discrimination was one of the factors causing Payne to go out of business. (*See, e.g.*, TR. 97-100; 706). At the time Payne went out of business, its going concern value was between $50,000 and $170,000, thereby meaning that the jury had adequate grounds for assessing damages of $111,247.48.

II. The Rebates Constituted Price Discrimination Which Violated Section 2(a) of the Act, and the Fifth Circuit's Opinion Imposed An Unreasonably Strict Standard of Proving Injury to Competition.

The Fifth Circuit held that no violation of the Act was proved because of a dearth of "documentary" evidence showing a possibility of lessening competition, the only evidence proved being a 4% drop in Payne's market share in 1972. However, Payne proved much more than that as seen from the evidence cited below!

All witnesses testified that the rebates reduced the dealers' cost of new automobiles (TR. 256, 617-618). Those reductions,

under the rebate programs in issue, favored the other three dealers during each program much more than they favored Payne. The retail customer had to pay a higher price than would otherwise have been the case in the absence of the rebate payments. This was so because, since the dealers discount to their customers off the list price, the favored dealers discounted slightly less off the list price than they would have if Payne had been receiving the same per unit rebates. The dealers enjoying the price discrimination were insulated from the competitive forces in the market and did not have to compete as vigorously, thereby making the retail price to the ultimate customer higher while, at the same time, lessening Payne's ability to compete. (TR. 203-204; 255-257).

Payne was caused to lose a large share of the market by the rebate programs. In 1968, Payne had 31.5% of the retail market when there was no price descrimination. It dropped to 25% by 1973 after 4 years of the price discrimination.

At the very least, the evidence was sufficient for the fact finder to infer the possibility of injury to competition, thereby showing a violation of the Act. *Perkins v. Standard Oil Company of California,* 395 U.S. 642, 648 (1969); *Great Atlantic & Pacific Tea Co., Inc. v. FTC,* 557 F.2d 971, 980-81 (2d Cir. 1977); *Altermon Foods Inc. v. FTC,* 497 F.2d 993, 999 (5th Cir. 1974); *Colonial Stores, Inc. v. FTC,* 450 F.2d 733, 739-40 (5th Cir. 1971); *Kroger Co. v. FTC,* 38 F.2d 1372, 1378-79 (6th Cir. 1971); *National Dairy Products Corp. v. FTC,* 395 F.2d 517, 522 (7th Cir.) *cert. denied,* 393 U.S. 977 (1968). As pointed out by the Fifth Circuit in *Foremost Dairies, Inc. v. FTC,* 348 F.2d 674, 680 (5th Cir.), *cert. denied* 382 U.S. 959 (1966), injury may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers; *see also National Dairy Products Corp. v. FTC, supra* at 522.

Another element of damage to Payne and hence to competition, is that the price discrimination in the rebate programs was a cause of Payne's business closing. When a city the size of

Birmingham loses a dealer which had been profitable for over twenty years until about 1969 (*See* Def. Ex. 1, p. 35), and whose slow decline resulted after the institution of price discrimination in the rebate programs, there must have been an adverse effect on competition. In *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir. 1965), the court held that the possibility of competitive injury may be inferred when there is evidence that the price differential is substantial enough to cut into the purchaser's profit margin and the price reduction afforded by the discrimination would permit the buyer a significant saving and have an effect on the decisions of the customers in the market. Dr. Ignatin and Mr. Payne testified that buyers of automobiles do a lot of price comparison since a car is such a high priced item (TR. 45-46; 124; 665). With the rebates as high as $300 on a particular program (*See*, for example, Pl. Ex. 52; App. 51), it can easily be seen that such a price reduction could aid a dealer's profit margin substantially and influence the consumer in buying from the favored dealer.

The trial judge properly charged the jury on the various elements of a *prima facie* § 2 (a) violation (TR. 795-799), and that the amount of price discrimination was *not* automatically the amount of any damages it might assess (TR. 805-806). The jury found that there was a violation of the Act. Certainly there was the possibility of lessening competition which is all the Act requires. The statute only requires that the price discriminations have a "reasonable possibility" that one of the proscribed effects will occur. *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967). In this case, Payne proved the necessary elements for a *prima facie* Robinson-Patman Act, § 2 (a) violation: (1) two or more sales in interstate commerce; (2) at different prices; (3) contemporaneous in time; (4) made by Chrysler to Payne and the other dealers; (5) of cars of like grade and quality; (6) that the favored dealers were engaged in competition with Payne; (7) that the effect of the price discrimination may have a possibility of lessening competition or injuring competition between the dealers who receive the benefits of the discrimi-

nation. *See Zwicker v. J. I. Case Co.*, 596 F.2d 305, 308, (8th Cir. 1979); *Belliston v. Texaco, Inc.*, 455 F.2d 175, 178 (10th Cir.), *cert. denied* 408 U.S. 928 (1972); *Eye Encounter, Inc. v. Contour Art, Ltd.*, 81 F.R.D. 683, 690 (E.D.N.Y. 1979).

To support a showing of actual injury to competition, one must only prove that a manufacturer is selling its goods to some customers substantially cheaper than it sells the goods to the competitor of those customers. *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948):

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a reasonable possibility that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. *This showing in itself is sufficient* to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence. (Emphasis added.)

In *American Motors Corp. v. FTC*, 384 F.2d 247 (6th Cir. 1967), the court held that once a *prima facie* case of price discrimination is made out and the proof shows that the seller gave discounts of slightly more than 3% to several favored customers, but did not grant similar discounts to many of its other customers, then there can be an inference that there was a reasonable possibility that competition was injured from the price discrimination. No lost sales need be proved, nor is it necessary to prove that the discounts equalled or exceeded the amount of the profit on the sales.

The rebated price discrimination varied from about $25 to $300 per car, depending on the program and the car model. Assuming the average dealer cost of a car to be about $3,500,[8] the rebates varied from slightly under 1% to over 8% of the dealer cost. Thus, there should be no question that when one

[8] An approximate average from the cost of sales figures on the third page of each Dealer Financial Statement, Pl. Ex. 17-35.

dealer, Payne, almost always received less rebates per car, there exists a reasonable possibility of lessening competition in general and of injuring Payne's ability to compete with the other dealers. The normal laws of price and demand in the market place insure that will occur.

Proof that the Fifth Circuit applied the wrong standards to determine if there was a violation of § 2 (a) of the Act is shown in the Court's convoluted reasoning that the average difference in the rebate payments over the relevant period amounted to only $11 per car between the best performing dealer and the worst one. 670 F.2d at 581. This piece of information is absolutely useless since the dealers' inventory of new cars turned over about every sixty to ninety days (TR. 60; 82-83) and Chrysler was paying a different rebate on different model cars which varied from program to program, each program lasting only two or three months. The dealers were competing during each program when the rebate that each received on each car would have been extremely important in determining the ultimate resale price. Therefore, the fact that over a 3½ year period, the "average" of total rebates received, when divided by the total number of *different* model cars, was an $11 difference between the highest and lowest performing dealer is an average of meaningless figures since it is not within a contemporaneous time frame and does not relate to rebates on cars of like grade and quality.

The sales price from Chrysler to each dealer for a car of like grade and quality during a simultaneous time frame (the running of the rebate program) is the crucial issue for determining whether or not price discrimination exists. It is during the running of each program that Payne will suffer when the competitors are able to undersell Payne or use the rebates for customer attracting devices such as advertising, incentives to salesmen, etc.

Chrysler paid larger rebates in some programs for the sales of higher priced cars, and Payne sold more higher priced cars (Chrysler and Imperial) than did the other dealers, getting

large rebates in those programs. Therefore, Payne's total rebates over the 3½ year period would have been increased somewhat by the fact that it did well on the higher priced cars; but it was also competing in sales of lower priced cars on which it did not receive nearly the same per car rebates during that 3½ year period. Therefore, the so-called "average" of the rebate payments per automobile is irrelevant for purposes of price discrimination. What is clear from the evidence is that Payne's business was severely injured from the rebated price discrimination *during* each program since there was much more than an $11 difference per car during each program.[6]

III. The Evidence Showed That Chrysler's Section 2(a) Violation Was the Proximate Cause of the Injury to Payne Under Section 4 of the Clayton Act.

A. *There Was Actual and Direct Proof of Antitrust Injury.*

The Fifth Circuit erroneously took away the jury's decision that there was antitrust injury. After proving a violation of § 2 (a) o fthe Robinson-Patman Act, Payne's burden of proving the violation caused damage under § 4 of the Clayton Act, and the amount of that damage, is somewhat lessened. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). The impact of the higher price from Chrysler to Payne cannot be measured only in terms of exactly how many sales were lost or "could have been made" by Payne had the price from Chrysler to Payne been equal to the price offered by Chrysler to the other competing dealers. Proving the number of lost sales is very difficult at best, extremely expensive, and sometimes cannot be done with the number of variables involved. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

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[6]For example, in Pl. Ex. 42, (Appendix 41), which shows the results of the rebate program "Winter Profit Days", from November 21, 1971 through January 31, 1972, Payne received no rebates on the various model cars covered in that program, while the other dealers received rebates of $35.00 to $150.00 per car model.

Rather, proof of damage can be shown by other means such as substantial price discrimination over a substained period, declining sales and profits, loss of market share compared to a period where there was no price discrimination, failure of Payne to pass through to the customers the amount of the price discrimination, and Payne's going out of business. Furthermore, Payne need not show that Chrysler's price discrimination was the sole cause of the damage to its business. Payne need only show that Chrysler's illegal conduct was a material cause of some damage. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969); *Continental Oil Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962).

The following direct proof, some of which has not been pointed out to this Court by Prior briefs, proved competitive injury caused by the price discrimination:

(1) Payne went out of busness because it had to pay the higher costs of the price discrimination (TR. 68-69; 706).

(2) Payne lost substantial numbers of sales and profits caused by the price discrimination. In 1968 when there was no price discrimination, Payne sold 658 new cars at retail and made a net profit of $36,140.62. (Pl. Ex. 61). In the years after that, its sales were always far less and it always lost money. In 1968, Payne had approximately 31.5% of the retail new car market (see footnote 2, *supra*), and its percent of the market diminished in future years with the advent of the price discrimination. This critical evidence has never before been pointed out to this Court.

(3) An economist testified that the Chrysler rebate programs had caused, in fact, an injury to competition by making consumers pay a slightly higher price for cars because Payne's competitors did not have to reduce their prices below list price quite at far as they would otherwise have done had Payne not been charged a higher price from Chrysler on the cars. This hurt Payne's ability to compete in this tough market (TR. 203-204), eventually being a cause of its demise. Chrysler's re-

bate programs reduced competition in the Birmingham market between the various dealers, had an adverse effect on competition in the market (TR. 222), caused Payne not to compete as well with the other dealers as it could have done had it received the same price reduction on the cars (TR. 256-257). The rebates actually injured Payne's business by causing it to lose *profits* it would otherwise have made had the cost of the cars been the same to all of the dealers and by diminishing its ability to compete (TR. 256-258).

(4) Payne had to "over-allow" on the used car trade-ins in order to obtain new car business. This over-allowance is a form of lost profits. It also had to reduce the gross profit margin on the new cars sold in order to obtain the new car sales (TR. 65-67; 91-92; 126-127). Because of the "over-allowing" on trade-ins Payne lost money on its used car operations (TR. 97-100; 538-539; 593-599) which caused the line of credit extended by Chrysler Credit Corporation to be withdrawn and Payne ceased business. Because of the lower prices from Chrysler to Payne's competition during the rebate program, Payne lost sales to its competitors which could undersell Payne (TR. 69-70).

(5) The Dealer Financial Statements during the relevant period of 1970 through 1974 (Pl. Ex. 17-35; 61) support the fact that Payne did not pass through its higher costs to the customer in the form of a higher sales price because Payne had to "over-allow" on used car trade-ins in order to obtain business, thereby showing a loss of profits in the used car portion of the business resulting from the price discrimination. *See, e.g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457, 459-60 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). Chrysler's own employee, Mr. Eric Lindenberg, testified that he noticed that Payne's used car operation was the primary area where Payne lost money, compared to the other dealers (TR. 538-539). The evidence introduced to the jury clearly shows that Payne absorbed most of the higher costs suffered by the price discrimination, and thereby lost profits. Although never pointed out to this Court before, the dealers' average gross

profits of *both* the used and new car business (Def. Ex. 31; App. 54-55) show that Payne was lowest in profit margin and did not pass through the price discrimination to the ultimate customer:

AVERAGE GROSS PROFIT (NEW AND USED CARS)

Date	Payne	Hall Motor	Roebuck	Central
1971	494	676	567	499
1972	548	590	588	537
1973	543	592	625	645

Since Payne had the lowest gross profit margin because of the price discrimination, it is clear that it did not pass on its higher costs for the cars to its customers. In such a case the amount of the price discrimination is the minimum amount of damage in the form of lost profits. *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wisc. 1979); *See Enterprise Industries, Inc. v. Texas Company*, 240 F.2d 457 (2d Cir.) *cert. denied*, 353 U.S. 965 (1957).

(6) Chrysler was guilty of a substantial price discrimination against Payne in the amount of $81,248.94 (TR. 191). There was keen competition in the market (TR. 45-48) and large rebate payments to Chrysler's competitors, sometimes as much as $300 per car. (*See, e.g.*, Pl. Ex. 52, App. 51). Net profit margins were generally low on the used cars and new cars, sometimes smaller than even the amount of the price discrimination per car.

Perkins v. Standard Oil Company of California, 395 U.S. 642, 648 (1969), established the basic principle applicable to jury verdicts under § 4 of the Clayton Act. This Court held that if there is *some evidence* in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury's determination (*Id.* at 648). In *Perkins*, there was no evidence that specific lost sales were caused by the price discrimination. The evidence showed that there was substantial price discrimination, that the defendant

passed on the price advantage, at least in part, to the plaintiff's competitors, that the plaintiff's business was losing money, and that Perkins complained to Standard officials of his competitor's price advantage.

Like *Perkins* in the instant case there was evidence of substantial price discrimination which lowered the cost of Payne's competitors' cars, that Payne's business was losing money and that Payne ha lked to Chrysler officials about adjusting his quotas and "fa. share" which caused the quotas to be so high (TR. 73-74). The fact that Payne was over-allowing on used cars, was not passing through the increased price, could not meet its competitors' lower prices and that Payne's share of the market had been substantially diminished since 1968, were certainly sufficient evidence to uphold the jury's verdict finding antitrust injury.

B. *The Price Discrimination and the Market Conditions in this Case Permit a Jury to Infer Injury to Payne's Business.*

In *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972), the court held that a jury could properly infer injury under Section 4 of the Clayton Act in the following situations:

> [1] . . . a price differential that influences prices . . . (*Morton Salt Company*) . . .
>
> [2] . . . a price differential that exists in the context of keen competition and tight profit margins (*E. Edelmann Company*)
>
> [3] or a substantial and sustained price differential be-.ween competing resellers (*National Dairy Products Corp.*)

The instant case has evidence supporting all three alternatives above in addition to the direct proof of injury mentioned previously.

Under § 4 of the Clayton Act, this court should permit proof of a *prima facie* case showing the fact of injury in the amount of the price discrimination when there is evidence of a sustained and substantial price discrimination in a market of keen competition where the discrimination could affect retail prices.

There is nothing particularly evil or new in this. An even lesser burden of proof for a plaintiff exists in "attempt to monopolize" cases where the element of "dangerous probability" is inferred from specific intent and that specific intent can be inferred from proof of predatory or anti-competitive conduct which unreasonably restrains trade. *Gough v. Rossmoor Corp.*, 505 F.2d 381, 390 (9th Cir.) *cert. denied*, 440 U.S. 936 (1979); *Janich Bros., Inc. v. American Distillery Company*, 570 F.2d 848, 854 (9th Cir. 1977). Therefore, in the instant case, the jury properly inferred injury to Payne's business. The comports with the Supreme Court's holding in this case that Payne's burden of proving injury is less when Chrysler has violated the Act.

There was other supporting evidence of the fact of antitrust injury. Payne's share of the market of the new car market dropped substantially from 31.5% in 1968 to 24% in 1970; to 26.9% in 1971; to 23% in 1972; to 25% in 1973[7] During the time when Chrysler used "fair share" to determine quotas and rebates, Payne's share dropped from 27% in 1971 to 23% in 1972. Payne's sales rebounded somewhat to 25% at the end of 1973, but only because the rebate programs had been running for over two years since Vestavia Chrysler had moved into Payne's trading zone and the quotas (after January 1973, based only on prior rate of travel) were less exaggerated against Payne than they were in 1971 and 1972.

In the instant case, Payne was partially excluded from the new car sales market by virtue of the price discriminations,

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[7]The new care sales (excluding fleet) of each of the competing dealers is shown in the following chart:

	1968	1970	1971	1972	1973
Payne	658	409	562	576	567
Vestavia		262	369	568	549
Central		521	467	585	399
Roebuck		537	688	765	753
Totals:	2089**	1729	2086	2494	2268
Payne % of Market:	31.5%**	24%	26.9%	23.1%	25%

**See, footnote 2, *supra*.

causing it to lose sales (TR. 65-67; 91-92; 94-95; 126-127). Payne also showed a loss of profits in the amount of the price discrimination since it did not pass through its increased costs to the ultmate customers. Because it did not pass on the higher prices, Payne always had the lowest gross profits even though it sold many more higher priced cars such as Imperials and Chryslers. Therefore, in this case there was ample evidence to permit a jury to find direct proof of injury or to infer injury to Payne from the price discrimination.

The Supreme Court has discussed in some detail the fact that a jury may conclude by inference that damage has occurred to an antitrust plaintiff and the limits of the burden of proof demanded of an antitrust plaintiff:

> The trial and appellates courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damaged plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; and damage issues in these cases are rarely susceptible of the kind of concrete detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact finder may 'conclude as a matter of just and reasonable *inference* from the proof of the defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 124 (1969). [Emphasis added]. *See also, Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969).

Justice Clark recognized in *Bargain Car Wash, supra,* that specific lost sales need not be proved when he cited the concurring opinion of Justice White in the case of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143 (1968):

> It would be enough with respect to causation if the defendant "materially contributed" to plaintiff's injury . . .

> or "substantially contributed notwithstanding other factors contributed also".
>
> . . .
>
> Bargain [plaintiff] must show a causal connection between the price discrimination and the injury it suffered, but this does *not require proof of loss of specific sales.*

466 F.2d at 1174 [emphasis added].

In the instant case, the Supreme Court reversed the Fifth Circuit's former holding that damage can only be shown by proof of specific lost sales and lost profits. There would have been no need for reversal if the correct result had been reached even though an erroneous standard had first been applied by the Fifth Circuit. Thus, the Supreme Court has recognized in this case, by implication, that damage may be proved from price discrimination without a showing of specific lost sales and profits. However, the Fifth Circuit continues to look for specific proof of lost sales or profits.

In *FTC v. Morton Salt Co., supra* at 48, the Court recognized that a merchant is injured when compelled to pay a higher price than his competitors. Supreme Court has recently held that a private consumer, under § 4 of the Clayton Act, is injured in his business or property when he pays more for a product than he legally should. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Payne also showed it paid more, did not raise its resale prices, and thus was injured under § 4.

Even the Fifth Circuit has often recognized that the facts of certain price discrimination cases will support an inference of causation. *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied* 414 U.S. 1136 (1973) (private case); *Foremost Dairies, Inc. v. F.T.C.*, 348 F.2d 674 (5th Cir.), *cert. denied* 382 U.S. 959 (1966); *Bruce's Juices v. American Can Co.*, 187 F.2d 919 (5th Cir.), *modified on other grounds and rehearing denied* 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951) (private case). In *Foremost Dairies, Inc. v. F.A.C.*, 348 F.2d 674 (5th Cir.), *cert. denied* 382 U.S. 959 (1966), the court considered whether the F.T.C. could properly infer the probability of injury to the customers

of Foremost if they did not receive certain price reductions. In that case, the evidence showed that the rebates were *not* passed through the purchaser to the ultimate consumer so as to reduce the price of the product. Even though there was no resulting price reduction to the consumer, the court held that if the rebate, which in effect was a price reduction to the purchaser, is sufficient to afford that purchaser a significant savings, and it would, if reflected in the resale price to the consumer, have a noticeable effect on the decision of the consumer to purchase, then "an inference of injury [to competition] may be properly indulged." (*Id.* at 680). The court held that it was unnecessary that there be evidence to prove that the favored customer actually undersold his competitor rivals. The substantial price advantage given by the rebates could afford the favored buyer a material capital advantage by enlarging his profit margin or enabling him to offer customer-attracting services which gave him substantial advantage over his competition. *Id.*

In *E. Edelmann and Company v. F.T.C.*, 239 F.2d 152, (7th Cir. 1956), the court held that a price differential, in the context of keen competition and tight profit margins, furnishes sufficient evidence to support a conclusion that all requirements for damage under the Robinson-Patman Act are present. In the instant case, the profit margins were very small when compared with the large rebates potentially available under the rebate programs, which sometimes amounted to several hundred dollars per car (*See* Pl. Ex. 52 and 53; App. 51-52).

Mr. Justice Jackson recognized what is patently obvious when price discrimination has occurred. He stated this principle succinctly during the argument of the *Morton Salt* case:

> A fellow who has got to pay more, has got less left – less in profit, less to carry on the business.

United States Law Week, vol. 16, no. 36, pp. 3276-77 (March 16, 1948). Even if the favored competitor did not reduce its price to the consumer, the disfavored competitor is damaged because *he loses his opportunities* to reduce his price (by the amount of the price discrimination) and undersell the favored

competitor, and maximize his profits and sales. Since Payne proved a substantial price discrimination, which it did not pass through to its customers, and which injured competition and caused it to lose its market share and diminish its profits, eventually going out of business, it has proved damage under § 4 of the Clayton Act. It need not prove by a sale by sale analysis that the favored dealers reduced their prices to the consumer because of the price favoritism.

C. *The Fifth Circuit's Decision Imposes an Unreasonably Harsh Standard of Proving the Fact of Damage and Is Contrary to the Policy of Enforcing the Antitrust Laws.*

The Supreme Court has long encouraged the private enforcement of the antitrust laws through practical and reasonable damages rules requiring only a reasonable estimate of the cause and amount of injury. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946). Despite clear Congressional intent to encourage private enforcement of the Act, statistics show that it has failed woefully. From 1936 to 1961, there were 111 private cases brought, but damages entered for the plaintiff in only six. Barber, *The Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 G.W. Law Rev. 181, 191-192 (1960). Also, Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 365, 383 (1970), wherein the number of Robinson-Patman Act private cases which have been tried and won by the plaintiff are listed for several years:

1964	170 Tried;	8 Won
1965	90 Tried;	16 Won
1966	107 Tried;	17 Won
1967	79 Tried;	13 Won
1968	79 Tried;	11 Won

This woeful failure of private enforcement of the Act will be continued if this Court permits the Fifth Circuit to substitute its judgment for that of the jury's.

IV. The Amount of Damage Was Proved to an Estimated Degree of Certainty Sufficient Under Section 4 of the Clayton Act.

A. *Since the Increase Price Was Not Passed Through, The Amount of the Price Discrimination Provides A Sufficient Estimate of the Amount of Damage in the Form of Lost Profits.*

Payne did not pass through the higher prices charged it by Chrysler as shown by the fact that Payne's profits on both new and used car sales combined were already the lowest of any of the four dealers. Undisputed testimony and the financial records of Payne established that it overallowed on used car trade-ins in order to get sales. Since Payne had the lowest gross profits because of price discrimination, it is clear that it did not pass on its higher costs for the cars to its customers. Also, unrefuted testimony shows the rebates were not passed on to the customers (TR. 85). In such a case, the amount of the price discrimination can be the amount of the damage. *Enterprise Industries v. Texas Co., supra* at 459-460; *Century Hardware Corp. v. Acme United Corp., supra.* Chrysler has heavily relied on the *Enterprise* case which held that increased cost (the price discrimination) to the purchaser is not a direct damage unless the plaintiff proves that the increased cost was absorbed, and not passed on to the customers, thus reducing profits.

Courts have held in numerous cases that, after showing an injury to the business resulting from the violation of the antitrust laws, the plaintiff has a lesser burden of proof in showing the *amount* of damage. *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264 (1946); *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 23-24 (5th Cir. 1974), *cert. dismissed,* 49 U.S. 987 (1974). All the plaintiff must do after showing injury resulting from violation of the antitrust laws is to show "some indication of the amount of the damage done." *Larry R. George Sales Co. v. Cool Attic Corp.,* 587 F.2d 266, 270 (5th Cir. 1979). In fact, the Fifth Circuit follows the well established principle

that permits evidence that "borders on the speculative" in order to estimate damages in an antitrust case. *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 984, 904 (5th Cir. 1973).

Once the fact of damage is established, the jury should be allowed to consider the amount of price discrimination as an indication of the measure of damages. The Court permits a much more liberal rule in Sherman Act cases. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968), the Court held that, in suing under § 1 of the Sherman Act, a purchaser is injured in at least the minimum amount of the illegal overcharge. *See also Illinois Brick Co. v. Illinois*, 434 U.S. 720, 724 (1977). In both the price fixing overcharge case and the price discrimination case there is an illegal overcharge. The gravamen of the violation in both cases is that the plaintiff has been charged too much and should be compensated for the overcharge. There is no statutory basis for distinguishing between a price overcharge and price discrimination in the instant case where Payne was caused to lose a share of the market. *Hanover Shoe* should be applicable to permit a jury to *at least* consider the price discrimination as the amount of damage, even if not automatically becoming the amount of damage.

Payne proved $81,248 of price discrimination. This is in itself a minimum estimate of the amount of lost profit damages since Payne did not pass through its increased costs to the customers. To require that a plaintiff demonstrate the specific amount of lost sales or profits would require an economic analysis even more complicated than that rejected by the Court in *Hanover Shoe*. While there were only two parties involved in *Hanover Shoe*, a Robinson-Patman case normally involves numerous parties. A plaintiff in a Robinson-Patman Act case would be forced to analyze the effects of the price discrimination on (1) his own pricing decisions (2) the effect of that price discrimination on the pricing decisions of all his favored competitors, who are not even properly parties to the lawsuit, and (3) the sales and profits of everyone.

Payne is not arguing that the amount of price discrimination is under § 2 (a) of the Robinson-Patman Act gives rise to "automatic damages." The Supreme Court rejected the contention that proof of price discrimination under § 2 (a) automatically entitles the victim to damage in a minimum of that amount. But the "automatic damage" argument was a proximate cause argument, not really an amount of damage argument. The Court has not prohibited a court or jury from *considering* the amount of the price discrimination as an estimate of the damages once the violation has been found to have caused actual antitrust injury under § 4 of the Clayton Act. Once the fact of damage has been proved, the total amount of price discrimination can be a proper minimum estimate of damages since the profit in Payne's sales was reduced by the amount of the price discrimination because Payne did not pass its higher costs through to the customer.

B. *The Price Discrimination Also Caused Damage in the Amount of the Lost Going Concern Value.*

The price discrimination in the rebate programs directly caused Payne another separate category of damage redressable under the Robinson-Patman Act: the loss of the going concern value of Payne's business. Payne could not exactly measure the reduction of profits except in the minimum amount of the price discrimination. However, there is a direct measurement of the loss of the going concern value of the business. Evidence of the value of Payne ranged from $50,000 to $170.000. Clearly, this injury to Payne is exactly the type of loss and damage that the Robinson-Patman Act was designed to compensate. Substantial evidence showed the amount of that damage. Once the price discrimination was shown to have an adverse effect on competition, and on Payne's business, then that certainly permits the jury to award $111,000 in damages based on lost going concern value alone.

CONCLUSION

The Fifth Circuit took the entire case away from the jury, basically because of no proof of specific lost sales or profits. Its holding does not permit a jury to infer injury to competition and infer injury to the business of Payne. There was evidence of substantial and sustained price discrimination, keen competition in the market, tight profit margins, Payne's loss of market share compared to 1968, loss of profits by over-allowing on its used cars, and testimony from an economist that the price discrimination injured Payne in its ability to compete with other dealers and also injured competition in general because the consumer would have to pay slightly higher prices that it otherwise would have paid absent the price discrimination.

Payne is not contending that price discrimination, coupled with other corroborating evidence, *automatically* infers injury. Chrysler is free to show that the disfavored purchaser was not injured in any way by the discriminatory prices. The rule Payne seeks is to merely permit a fair decision from a jury which may infer injury from the evidence presented in this case.

This Court should reverse the Fifth Circuit and reinstate the jury verdict.

Respectfully submitted,

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PROOF OF SERVICE

I, C. Lee Reeves, attorney for J. Truett Payne Company, Inc., a corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ____ day of July, 1982, I served three copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, together with three Appendices thereto, by mailing and depositing same in the United States Post Office or mail box, with first class postage prepaid, in a duly addressed envelope, to The Honorable J. Ross Forman, III, 1600 Bank for Savings Building, Birmingham, Alabama 35203, attorney for Chrysler Motors Corporation, a corporation.

It is further certified that all parties required to be served have been served.

This the ____ day of July, 1982.

C. Lee Reeves

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